1201

SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OBTOBER TERM, 1967

No. ~~1201~~ //

JOSEPH DeCESARE and RALPH BLACKBURN,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit

PETITION [redacted]

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Petition for Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit

PETITION AND SUPPORTING BRIEF

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Court of Appeals for the Fifth Circuit affirmed the judgment of conviction on January 31, 1966. (Transcript of Record — 393). Petition for rehearing was denied on March 7, 1966. (Transcript of Record — 401).

3109, in executing the search warrant? (Transcript of Record - 395).

REASONS FOR ALLOWANCE OF THE WRIT

1. Each of the questions presented herein embody questions of federal law which have not been, but should be settled by this Court.

2. The decision herein sustaining venue of the cause in Jacksonville, Florida, although petitioners resided in Hollywood, Broward County, Florida, in which later county they allegedly operated in the business of accepting wagers, is a violation of petitioners rights under the Sixth Amendment and Article III, Section 2 of the United States Constitution, in that they were tried in the Middle District of Florida, and not in the Southern District.

3. The decision herein convicts petitioners of the offense of willfully failing to register and pay the gambling stamp tax, an essential element of which is actual knowledge of the existence of the obligation and a wrongful intent to evade it, although there is no testimony in the record that petitioners had complied with the obligation in prior years, or had a record of prior gambling arrests, or had been forewarned to pay the tax, or were aware a federal tax was due and is in conflict with the decision of the Fifth Circuit in Edwards vs. United States, C.C.A. 5th, 334 F. 2d 360, Cert. denied, 1965, 379 U.S. 1000.

4. The decision herein is at variance and conflicts with 18 U.S.C.A. §3109 which prescribes that an officer may break open any outer door to execute a search

warrant, if after notice of his authority and purpose, he is refused admittance.

5. The decision herein appears to be in conflict with applicable decisions of this Court.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fifth Circuit, and that the certified transcript, which has been filed herewith and duly verified by the Clerk of the Court of Appeals for the Fifth Circuit, and the judgment of that Court be reviewed by this Court and for such other relief as to this Court may seem proper.

Dated, April 4, 1966.

Respectfully submitted,

By: _____

BRIEF IN SUPPORT OF PETITION

STATUTES INVOLVED

The Federal Statutes involved are Sections 3109 of Title 18, U.S. Code; Sections 4401, 4411, 4412, 7203 of Title 26, U.S. Code. Pertinent portions of these statutes are quoted in the appendix.

STATEMENT OF THE FACTS

The Information

The information is in one count. It charges petitioners were, between March 1, 1964 through March 24, 1964, jointly engaged in the business of accepting wagers in Broward County, Florida, and then willfully and knowingly failed to register with and pay to the District Director of Internal Revenue for the Jacksonville District the special tax as required by the provisions of Sections 4411, 4412, 4901 (a) Title 26 U.S. Code in violation of Title 26, U.S. Code, Section 7203 (TR-1)

Petitioners filed motion to dismiss and/or transfer for improper venue, jurisdiction, contending they resided in Hollywood, Florida, which is in the Southern District of Florida, and that trial in Jacksonville, Florida, which is in the Middle District, would violate their rights under Article III, Section 2 and the Sixth Amendment of the United States Constitution. (TR-3). This motion was denied. (TR-12).

The Evidence

On March 24, 1965 Special Agents of the Internal Revenue executed a search warrant on the premises at 3431 N.W. 72 Terrace, Hollywood, Florida. (TR-119).

According to petitioner De Cesare, only five seconds elapsed from the time he heard someone yell "Federal Agents" and "with a warrant" until some entered the house. (TR-163). Agent Forman testified that he smelled ordinary smoke and based on his experience believed that

evidence was being destroyed and thereupon broke into the premises. (TR-151).

Petitioners' Motion to suppress, based on Federal Statute Section 3109, Title 18 U.S. Code was denied by the Court. (TR-183).

None of the government's twelve witnesses testified that petitioners had any prior history of operating a bookmaking business. No prior arrests for gambling or related offenses were indicated. Neither petitioners were shown to have purchased the gambling stamp tax in prior years. No one testified the petitioners had been previously warned or cautioned to pay the tax. Federal Agent Forman admitted that when he asked petitioner DeCesare whether he had a gambling tax stamp he replied, "what stamp?". (TR-204).

ARGUMENT

I.

The Court of Appeals erred in holding venue was proper in the Middle District of Florida.

Rulings as to venue, we submit, should be decided in favor of permitting trial at the defendant's residence:

> "The Constitution and the Bill of Rights provide that the trial of crimes shall be held in the state where the said crimes shall have been committed.' Article 3, Section 2, Cl. 3, and before an impartial jury of the state and district wherein the crime shall have been committed. Recogniz-

> ing the unfairness and hardship which trial in an environment alien to the accused exposes him, and the important policies underlying the venue provisions of the Constitution and Bill of Rights, the Supreme Court has declared that venue statutes should whenever possible, be construed to permit trial at the residence of the Defendant. U.S. vs Johnson, 655 Ct. 250. The position taken by the government in this case is squarely contrary to this rule of construction, for it would permit the government to select the place of trial to suit its sole convenience..." United States vs. Cashin, 2d Cir. 1960, 281 F.2d 669.

The petitioners, residents of Hollywood, Florida, were arrested in that City on process issued from the Southern District Court (TR-9). An information was filed in the Middle District, in Jacksonville, some 300 miles away from petitioners residence. Their wager taking operation occurred in Hollywood. The Lower Court held that as the petitioners had to register through the District Director's office (Jacksonville) the charges should be brought and tried in the Middle District (TR-9).

The petitioners were caused to transport themselves and counsel to the distant city of Jacksonville, at heavy expense, and stand trial in an unfamiliar atmosphere, in contravention of their constitutional rights.

II.

The record was insufficient for the jury to have concluded petitioners knew of the stamp tax obligation

and willfully failed to register for and pay the gambling tax.

Petitioners were convicted under Section 7203 (26 U.S.S. §7203), which provides that:

> "Any person required under this title to pay any estimated tax or tax... who willfully fails to pay such estimated tax or tax... shall... be guilty of a misdemeanor..."

In this offense, an essential element is that of willfulness, which has been defined as "...a specific wrongful intent... actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence...". Hargrove vs. United States, 5th Cir. 1933, 67 F. 2d 820.

It was not shown that the petitioners had complied in prior years. Brown vs. United States, 5th Cir. 1957, 249 F. 2d 306. No one testified that the petitioners had been forewarned to pay the tax. Contreras vs United States, 5th Cir. 1954, 213 F. 2d 96, 99. Nor was it established that the petitioners had any long experience in the bookmaking business. Edwards vs. United States, 5th Cir. 1964, 334 F. 2d 360, 365. Unlike the Defendant Edwards in that decision neither of the instant petitioners had prior gambling arrests.

While the evidence may support an inference that the petitioners were engaged in accepting wagers, there is nothing further in the record to support the additional inference that they were aware of the wagering tax. United States vs. McGonigal, D. Del. 1963, 214 F. Supp. 621.

We submit that the evidence was insufficient to indicate that the Petitioners willfully failed to register and pay the gambling tax and the decision herein conflicts with the **Edwards** case, supra.

III.

The Court of Appeals erred in finding the search warrant was reasonably executed.

The Federal Statute found at Section 3109, Title 18 U.S. Code provides that:

> "The officer may break open any outer or inner door or window of a house or any part of a house or anything therein to execute a search warrant **if after notice of his authority and purpose, he is refused admittance** or when necessary to liberate himself..."

There are no exceptions in the statute, for example, for smelling smoke. We submit this staute is a statutory definition of reasonableness. The violation of this statute would render the search and its fruits improper.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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WE HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION was mailed to the SOLICITOR GENERAL, Attorney for Respondent, DEPARTMENT OF JUSTICE, WASHINGTON, D.C., this _____ day of April, 1966.